

OGC Has Reviewed

OGC 76-6926

6 December 1976

MEMORANDUM FOR:

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FROM

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Office of General Counsel

SUBJECT : EEO/Use of Professional Aptitude Test Battery (PATB)

1. This is in response to your question whether the recommendations proposed in the 24 November 1976 memorandum of the DCI/EEO Advisory Panel to the DDCI are dictated by legal requirements. The Panel makes several recommendations concerning the Agency's use of the PATB: deemphasize its predictive qualities; place the sole responsibility for determining suitability for Agency-wide professional employment with the hiring official; develop guidelines at the component level for the use of the PATB; and indicate what ability measures the guidelines would discuss for each unit.

It is the opinion of this Office that there are no legal requirements or impediments to the adoption of the recommendations, and that their adoption is a matter of administrative discretion. I would advise, however, that some clarification of the recommendations is needed before implementation.

2. By way of background, it must be said that the PATB and similar tests must be job related in order to withstand the scrutiny of a Title VII inquiry. Griggs v. Duke Power Company, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971). Griggs held that tests for employment must indicate a reasonable measure of job performance. The three basic methods of validating such tests for their relationship to job performance are:

Criterion, or empirical, validation involves proving that the abilities, interests, and knowledge measured by the test are directly related to job performance. This would correlate an individual's performance on test and job; that is, how well its predictions agree with subsequent outcomes.

Construct validation measures the degree to which job applicants have identifiable characteristics that have been determined desirable for successful job performance. Here there is no single criterion; many are required to confirm what the test does and does not measure.

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Content validity is established by demonstrating that the test approximates the specific knowledge, skills, and behaviors to be performed on the job by the applicant. Content validation is relevant for achievement testing.

3. The most recent Supreme Court decision on this topic, Washington v. Davis, __ U.S. __, 96 S. Ct. __, 48 L. Ed. 2d 597, 612 (1976), held that a test which measures likelihood of success in a police training program satisfied Griggs, and stated: "[i]t appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance." The Court indicated that the three basic methods are accepted by the American Psychological Association in its Standards for Educational and Psychological Tests and Manuals, but expressed no preference. The Civil Service Commission Guidelines at 41 Federal Register 51752, dated 23 November 1976, recently promulgated by the Commission after coordination with the Labor and Justice departments, adopt these same validation methods. Any attempt at revising present Agency practice, emphasis, and use of PATB should certainly be made only after a careful consideration of these Guidelines (see attachment).

4. For example, careful analysis might reveal at what level within the Agency the review and interpretation of PATB analyses should be made, what criteria the Agency guidelines should establish, and what information the analyses should contain. Neither Griggs nor subsequent cases would demand a particular approach. It must be clearly ascertained what validation method is to be adopted, over how broad a base it is to be applied, and who is a "unit supervisor" to review and interpret results. Whether the determination of suitability should be "the sole responsibility of the hiring official" is not a legal issue, but should be carefully considered if it would alter current practice.

5. The recommendation "[n]o statement should be made concerning suitability or non-suitability for Agency-wide professional employment" is an interesting one, but not required under the new guidelines. Selection procedures may be used to predict the performance of candidates for a job which is at a higher level than the job for which the person is initially being selected if a majority of the individuals who remain employed will progress to the higher level within a reasonable period of time. Naturally, this is a difficult test, and one which should be clearly documented; but while this approach could subject the Agency to charges of elitism, the alternative could overly restrict mobility of employees and their utility to the Agency. Careful consideration must be given because proving job relatedness becomes more difficult when the test is used to determine subsequent rather than initial job duties.

6. I raise these questions because of the complexity of the subject matter and the uncertainty as to which selection procedures or validation method the EEO Panel would recommend, if any. Deemphasis of the predictive qualities of the PATB as recommended suggests that a content validity (e.g., achievement test) approach would be used, but there still seems to be a focus by the Panel on the construct approach as evidenced by the psychological testing guidelines proposed. The utility of one approach over the other is a matter for psychologists and managers, but either could be legally permissible.

7. Finally, greater use of a PATB analysis as a placement tool could result in a departure from presumably objective selection procedures and a greater reliance on personal interviews. Such procedures are notoriously subjective and often too unreliable a way of assessing a job candidate. Thus, ironically, relying less upon the PATB could actually make it easier to discriminate.

8. In conclusion, there is no legal requirement imposed by statute or case law that these proposals be adopted; nor are there any legal impediments to their implementation. Nevertheless, their merits must be carefully weighed, and legal considerations could arise at a later date regardless of whether they are adopted. I would be happy to provide further comments or assistance in this regard if necessary.



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